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No. 122

In the Supreme Court of the United States

OCTOBER TERM, 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GULBERT GEE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINION BELOW

The opinion of the court below (R. ~~114-118~~ 72-76) is reported at 179 F. 2d 499. The Board's petition for rehearing was denied without opinion on March 18, 1950 (R. ~~132~~ 78). The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. ~~53-107~~ 32-62) are reported at 83 NLRB 1.

JURISDICTION

The decision of the Court of Appeals was issued on January 30, 1950, and the decree was entered on June 5, 1950. The petition for rehearing was

denied on March 18, 1950. The petition for a writ of certiorari was filed June 8, 1950, and granted on October 9, 1950. The jurisdiction of this Court rests on Section 10 (e) of the National Labor Relations Act, as amended, and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an employer who has discriminatorily discharged an employee in violation of Section 8 (a) (1) of the National Labor Relations Act, as amended, must be allowed to deduct from his back pay obligation, under an order of the Board, sums paid to the employee by the State as unemployment compensation.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), the Federal Employment Tax Act (53 Stat. 1387, 1388, 26 U. S. C. 1600–1601), and the Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat. 1949, Secs. 4434.1, *et seq.*) are set out in the Appendix, *infra*, pp. 62–74.

STATEMENT

Following the usual proceedings under Section 10 (c) of the National Labor Relations Act, the

Trial Examiner, on January 14, 1949, issued his intermediate report (R. 60–107), finding that the Company (respondent herein) had discharged certain employees in violation of Section 8 (a) (1) and (3) of the Act, and recommending that the Company be required to reinstate these employees with back pay. The Company excepted to the intermediate report (R. 51–53) on the ground, *inter alia*, that the Trial Examiner "failed to recommend that there be deducted from the back pay award for each employee such sums of money as have been received by each employee from the Louisiana Unemployment Compensation Fund." On April 21, 1949, the Board issued its Decision and Order (R. 53–58) adopting the Trial Examiner's findings and recommendations with modifications not pertinent here (R. 56), and rejecting the Company's contention that unemployment insurance benefits should be deducted from the back pay awards. Finding that such action "will effectuate the policies of the Act" the Board, in the form usual for such order, directed the Company, *inter alia*, to make the employees whole for their wage losses by paying them what they would have earned had they remained in the Company's employ, less such sums as they

actually earned in the interim or failed without excuse to earn (R. 57).[1]

The Company filed with the court below a petition to review the Board's decision and order (R. 1), contending *inter alia*, that the Board's order, to the extent that it precluded deduction of unemployment insurance benefits from the back pay obligation, was punitive in character. The Board answered and requested enforcement of its order (R. 15). On January 30, 1950, the court

[1] The order required the Company to—

"(a) Offer to [named employees] immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [2] and less willful losses, if any, incurred by him during such period.

[2] "By 'net' earnings' is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the consequent necessity for his seeking employment elsewhere. *Matter of Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. *Republic Steel Corporation* v. *National Labor Relations Board*, 311 U. S. 7."

below issued its decision sustaining the Board's finding that the employees were discharged in violation of Section 8 (a) (1) of the Act.[2] The court enforced the reinstatement provision of the Board's order, but modified the back pay provision by permitting the Company to reduce its back pay obligation by deducting such amounts of money as the employees may have received from the Louisiana Unemployment Compensation Fund.[3] In explanation of this modification of the order, the court stated (R. 117), "On the authority of *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. 6, we agree with respondent." The Board filed a petition for rehearing (R. 119–132) on the question of the deductibility of the unemployment compensation benefits, which the court denied without opinion on March 18, 1950 (R. 132).

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[2] The court reversed the Board's finding that by the discharge the Company also violated Section 8 (a) (3) of the Act and struck from the order a provision requiring the Company to cease and desist from violating this subsection. The Board does not seek review of the judgment below in this respect.

[3] The court below in its opinion inadvertently described the State agency as "Louisiana Workmen's Compensation" instead of Louisiana Unemployment Compensation. The decree reads correctly.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Board is required to permit deduction of unemployment compensation benefits from back pay.

2. In relying upon the decision in *Republic Steel Corp.* v. *National Labor Relations Board, supra,* as authority for the holding that unemployment compensation benefits must be deducted from back pay awards.

3. In failing to enforce in full the back pay order of the Board.

SUMMARY OF ARGUMENT

The Board's order in this case directing the award of back pay to wrongfully discharged employees provided, according to the Board's usual form, that the employer's obligation should be reduced by any earnings which the employee received and amounts which he wilfully refused to earn, but refused to allow a like deduction for collateral benefits such as benefits from the state unemployment compensation fund. The question is whether the Board's determination that that practice "will effectuate the policies of the Act" was a determination which it was competent for the Board, in the exercise of its informed discretion, to make.

I

A. In framing its remedial awards, the Board is vested with broad discretion. This Court has said that its order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 540. The practice which the Board has here followed is essentially that which prevailed at common law in actions for damages for wrongful discharge. In such actions the common-law courts permitted recovery only of the earnings lost, and disregarded other collateral—and often very serious—losses to the employee resulting from the discharge, such as distress sales, forced borrowing, evictions, mortgage foreclosures, forfeiture of rights under installment contracts and insurance policies, and impairment of physical and mental health. As a corollary, the common-law courts likewise disregarded benefits received by the employee, other than alternative earnings or amounts which the employee wilfully refused to earn. A like rule appears to have been applied by various administrative agencies prior to the adoption of the Wagner Act.

B. Congress contemplated that it would be appropriate for the Board to apply this rule. Some

of the preliminary versions of the bill which became the National Labor Relations Act would have authorized the Board to measure awards to unlawfully discharged employees by such broad standards as "substantial justice," or "restitution." Had these standards been adopted it might have been argued that the Act required a departure from the common-law test so as to award recovery for collateral losses suffered by the employee. In that event, it might have been appropriate also to consider benefits other than earnings. The bill as passed, however, adopted the formula of authorizing awards of "back pay," a phrase which is clearly suggestive of the "loss of earnings" test. Thus while Congress did not seek to limit the Board's discretion in framing its remedial orders, it clearly did contemplate that it would be appropriate for the Board to apply the common law test.

C. In any event, adoption of that test by the Board was an appropriate exercise of the Board's discretion. While the Board is not limited to the application of common-law rules, it certainly is not precluded from applying them where they seem appropriate. The back pay which Congress authorized the Board to award serves many of the same functions as an award of compensatory damages to one discharged in breach of a contract of employment. Moreover, the common-law rule has the advantages of familiarity and relative sim-

plicity of application. Prior to the decision below, the only two courts of appeals that had passed on the question had approved the Board's practice in this respect.

D. The Board's practice was presumably known to Congress, having been referred to in numerous reports of the Board. In the course of enactment of the Taft-Hartley Act in 1947, Congress exhaustively reexamined the provisions of the Wagner Act, and the Board's practice under them. Hence the fact that it reenacted the back-pay provisions without any change material to the present issue is a strong indication of its approval of the Board's practice in this regard.

II

A. The Company's argument that unemployment insurance benefits are direct rather than collateral is without foundation in law or fact. Courts applying the common law "loss of earnings" test have uniformly held that unemployment compensation benefits and railroad retirement annuities to which the employer has contributed are collateral and not direct. In *National Labor Relations Board* v. *Marshall Field & Co.*, 129 F. 2d 169 (C. A. 7), affirmed on other grounds, 318 U. S. 253, the Court of Appeals for the Seventh Circuit so held as to unemployment compensation benefits.

Benefits are deemed direct only when procured by the employer or where they have been paid

or received to satisfy his liability. This Court has held that an employer's unemployment insurance payments are taxes. Plainly, employers do not, by paying their taxes, purchase immunity from responsibility for the injuries resulting from their illegal conduct. Unemployment compensation laws were designed to minimize hardships growing out of economic unemployment; they were not created to protect employers against the consequences of wrongful discharges. Moreover, the employers' payments are not segregated, but are placed in a pooled fund out of which all benefits are paid.

The fact, if it were shown, that the Company's rate of contribution may be affected by the amount of benefits the discharged employees receive would not establish that the benefits are direct rather than collateral. The benefits are paid by the State, not by the Company. The tax rate was designed to vary with the amount of unemployment chargeable to each employer, not through some notion that employers were financially liable to all employees whom they dismiss, but because this device would tend to stabilize employment by discouraging layoffs and discharges.

In any event, there has been no showing in this case that the employer's rate of contribution has been affected by the discharges. In view of the complex factors which enter into a deter-

mination whether particular discharges affect an employer's tax rate, it is impossible to argue even hypothetically, as the Company seeks to do, that the discharges will affect its rate. Moreover, even if the Company had in fact been assessed a higher rate as a result of charges to its rating account, it might, under the Louisiana law and under this Court's decision in *Social Security Board* v. *Nierotko*, 327 U. S. 358, be able to expunge such charges from its record.

B. The Company's argument that the Board's policy results in an award which makes the employee more than whole rests upon the fallacious premise that in computing the employee's net loss attributable to the discharge, collateral benefits but not collateral losses must be considered. Unless employees are made whole for their collateral losses, it is unfair even to suggest that failure to deduct collateral benefits, such as unemployment insurance, will result in a windfall to the employees. Moreover, the Company overlooks the very real possibility that the state may recoup from the employees any benefits paid them during the period of discharge upon receipt by the employees of back pay for the period involved.

Finally, receipt of unemployment compensation itself results in additional losses to the employee which offset even further the hypothetical "windfall" of which the Company complains. Under

the Louisiana law each time a worker, discriminatorily discharged, is required to draw upon his unemployment compensation, he reduces the reserves otherwise available for a subsequent period of non-discriminatory unemployment. In addition, if the employer is permitted to deduct benefits from back pay, the employee's standing under the Federal Old Age and Survivors Insurance program would be prejudiced.

C. The Board's order is not punitive. The argument that non-deduction of unemployment benefits makes the Board's order punitive was correctly rejected by the Seventh Circuit in the *Marshall Field* case, *supra*. In common-law tort and contract cases, the amount of damages recoverable is not affected by collateral benefits paid to injured parties. Yet in those cases the award is deemed compensatory, not punitive. The same is true in cases involving statutes which prescribe as compensation to an employee for wrongful discharge or minimum wage violations an amount arbitrary in character and larger than the wages which would have been earned for the period covered. Nothing in this Court's decision in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, supports a contrary view. Indeed, that case approved the loss of earnings test. Its holding that the Board could not direct the employer to make payments to other governmental agencies to effectuate the policies of those

agencies has no relevance to the issues here presented.

ARGUMENT

INTRODUCTION

The narrow question presented by this case is whether, in awarding back pay to employees who have been wrongfully discharged, the Board could properly refuse to provide for the deduction of unemployment compensation benefits paid pursuant to state law. That question was presented to this Court in *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, but it was not decided in that case because the company's objection had not been properly presented to the Board. There is no doubt that the question is properly presented here.

We think it clear that the refusal to permit deduction of such unemployment compensation benefits was within the Board's power. In selecting remedial provisions which, in its opinion, will effectuate the policies of the Act, the Board is entrusted with a broad discretion. In exercising that discretion, it has adopted the so-called "loss of earnings" rule under which the measure of the employee's recovery is the earnings which he has lost, less any alternative earnings which he obtained or wilfully refused to obtain. Under that rule, collateral losses to the employee such as those flowing from eviction, distress sales, forced

borrowing, forfeiture of rights under installment contracts, mortgage foreclosures, and loss of mental and physical health resulting from the loss of earnings—are ignored, and, by the same token, collateral benefits to the employee, such as insurance receipts, gifts, workmen's compensation benefits, union relief payments, and unemployment compensation benefits are equally disregarded. As this Court has held, unemployment compensation benefits are "plainly not 'earnings'" (*Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255), and may not therefore, compatibly with the "loss of earnings" rule, be deducted from the back pay obligation.

In the first part of this brief we shall discuss the basis for the rule adopted by the Board, pointing out that it was the rule which prevailed at common law and was applied by various administrative agencies prior to the adoption of the Wagner Act, that its appropriateness was contemplated by Congress, which authorized awards of "back pay" and rejected broader formulations of relief in terms of "substantial justice" or "restitution"; that its adoption clearly serves to effectuate the policies of the Act; and that the Board's practice has, in effect, been ratified by the reenactment of the Act without change in this respect. We shall then discuss respondent's contentions that because of the nature of unemploy-

ment compensation payments under Louisiana law, those payments should be regarded as direct rather than collateral benefits within the general rule which the Board has adopted, and its further contentions that the effect of the Board's order is to impose a penalty, and that the order is thus contrary to the decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7.

I

IN THE EXERCISE OF ITS POWER TO FRAME REMEDIAL ORDERS WHICH WILL "EFFECTUATE THE POLICIES OF THE ACT," THE BOARD PROPERLY ADOPTED THE PRACTICE OF REFUSING TO PERMIT DEDUCTIONS FROM BACK PAY AWARDS OF COLLATERAL BENEFITS OTHER THAN EARNINGS, RECEIVED BY THE EMPLOYEE AS A CONSEQUENCE OF HIS UNLAWFUL DISCHARGE

The Act authorizes the Board, upon finding that an employer has committed an unfair labor practice, to require him "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Section 10 (c). The Board and the courts have uniformly recognized that the purpose of Congress in empowering the Board to award back pay was not to provide a system for securing private rights to employees but to provide a method of enforcing the poli-

cies of the Act in the public interest.[4] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48–49; *Phelps Dodge Corp* v. *National Labor Relations Board*, 313 U. S. 177, 197; *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146, 151 (C. A. 5). Since the vindication of public policy is to be accomplished by awards to the illegally discharged employees, the Board must exercise the discretion entrusted to it by Congress (*Phelps Dodge Corp.* v. *National Labor Relations Board*, *supra*, at p. 198) in determining the amounts appropriate to achieve this purpose. This Court has often noted that Congress vested in the Board broad discretion in the formulation of remedial orders.[5] Framing a reimbursement order "is a complex problem for the Board to decide in the light of its administrative experience and knowledge." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543. Unless the Board's choice of means is arbitrary, it will not be upset. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194, 198. Its order "should stand unless it can be shown that the order is a patent attempt to

[4] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 24.

[5] See, e. g., *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194, 198; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543; *Franks Brothers Co.* v. *National Labor Relations Board*, 321 U. S. 702.

achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board, supra,* at 540.

A. THE RULE ADOPTED BY THE BOARD IS THAT WHICH PREVAILED AT COMMON LAW AND HAS BEEN APPLIED BY OTHER ADMINISTRATIVE AGENCIES.

In exercising its informed discretion as to the measure of relief appropriate to a wrongfully discharged employee, the Board had available to it as a guide the standards which had been applied by courts and administrative agencies in allowing damages for wrongful discharge in breach of an employment contract or other legal obligation. At common law, damages for wrongful discharge in breach of employment contract were awarded to compensate for loss of earnings and were measured by the amount the employee would have earned had he not been discharged.[6] Collateral losses to the employee other than earnings lost were disregarded. The same measure of damages applied where time was lost as a result of a tort.[7]

Under the loss of earnings test only sums which the discharged employee earned, or failed without excuse to earn, were considered in mitigation of the employer's liability for the loss of earnings

[6] Williston on *Contracts* (Rev. Ed., 1937), Sec. 1358.

[7] McCormick on *Damages* (1935), pp. 309-310; *Restatement of the Law of Torts*, Sec. 924, Comment *c*.

resulting from the illegal discharge.[8] It was well settled that an employer's liability could not be reduced by showing that the employee had received collateral benefits other than earnings during the period of unlawful separation.[9]

The rationale for permitting deduction from the employer's obligation of sums which the employee earned in other employment was the fact that the discharge freed the employee to dispose of his services elsewhere.[10] The rationale for permitting deduction of sums which the employee failed without excuse to earn lay in the common law's concern for the "economic welfare and prosperity of the whole community."[11] Failure to deduct such sums from the amount paid to the employee would have fostered idleness to the obvious detriment of the community. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197–200. On the other hand to reduce the wrongdoer's obligation by crediting to him sums given or offered the employee by third parties, other than earnings, would not foster this or any other desirable social policy. It

[8] Williston on *Contracts* (Rev. Ed., 1937), Sec. 1358, *Restatement of the Law of Torts*, Sec. 924, Comment *c*.

[9] McCormick on *Damages* (1935), pp. 146, 310; Sutherland on *Damages*, 4th Ed. (1916), Vol. 1, Sec. 158, pp. 487, *et seq*; *Restatement of the Law of Torts*, Sec. 920, Comment *c*; 15 *Am. Jurisprudence*, *Damages*, Secs. 198–202.

[10] McCormick on *Damages*, p. 146.

[11] McCormick on *Damages*, p. 127.

would instead simply minimize the risks of unlawful conduct, thereby devitalizing the deterrent effect of the remedy, without any compensating social advantage. Thus, for example, a provision that unemployment compensation benefits received by the employee should *pro tanto* reduce the employer's back-pay obligation is not necessary to guard against the danger that discharged employees may wilfully remain idle. Under the unemployment compensation acts themselves employees must, as a condition of obtaining benefits, register for employment and continue to report to an employment office; if there is work available, and an employee refuses to accept it, the payment of benefits stops.[12]

For these reasons the common law courts have denied mitigation where the benefits received by the injured party took the form of unemployment insurance benefits,[13] railroad retirement annuity payments,[14] federal vocational rehabilitation payments,[15] receipts from an insurance

[12] Commerce Clearing House, *Unemployment Insurance Reporter*, Vol. 1, Treatise, Paragraph 1940, p. 4631.

[13] *Bang* v. *International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 116.

[14] *McCarthy* v. *Palmer*, 29 F. Supp. 585, 588–589 (E. D. N. Y.), affirmed, 113 F. 2d 721, 723 (C. A. 2), certiorari denied, 311 U. S. 680; *Hetrick* v. *Reading Co.*, 39 F. Supp. 22, 24–25 (D. N. J.).

[15] *Cannien* v. *Superior Iron Works*, 175 Wis. 172, 187–188, 184 N. W. 767.

policy,[16] gifts,[17] workmen's compensation insurance or benefits[18] or charitable gifts.[19] The rule likewise applied without regard to whether the benefits received by the injured party came from a fund to which the employer contributed.[20] "The payment of such moneys, not being procured by the defendant, and they not having been paid or received to satisfy in whole or in part his

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[16] *Bangor & Aroostook R. Co.* v. *Jones*, 36 F. 2d 886, 890–891 (C. A. 1); *Brabham* v. *Baltimore & Ohio R. Co.*, 220 Fed. 35, 36 (C. A. 4); *Cox* v. *City of Chicago*, 83 Ill. App. 540, 542; *Louisville, etc., R. R. Co.* v. *Carothers*, 23 Ky. L. Rep. 1673, 1674, 65 S. W. 833; *Rusk* v. *Jeffries*, 110 N. J. L. 307, 311, 164 A. 313; *Littman* v. *Bell Telephone Co.*, 315 Pa. 370, 381, 172 A. 687; *Heath* v. *Seattle Taxicab Co.*, 73 Wash. 177, 186, 131 P. 843.

[17] *Hayes* v. *Morris & Co.*, 98 Conn. 603, 607–608, 119 A. 901; *Campbell* v. *Brandenburger*, 35 Del. 203, 209, 162 A. 354; *Nashville, etc., Ry. Co.* v. *Miller*, 120 Ga. 453, 457, 47 S. E. 959; *The Ohio, etc., R. W. Co.* v. *Dickerson*, 59 Ind. 317, 324; *Williams* v. *St. Louis, etc., Ry. Co.*, 123 Mo. 573, 585, 27 S. W. 387; *Illinois Cent. R. R. Co.* v. *Porter*, 117 Tenn. 13, 22–23, 94 S. W. 666.

[18] *Overland Construction Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6); *Liggett & Myers Tobacco Co.* v. *DeParcq*, 66 F. 2d 678, 687–688 (C. A. 8); *Pappas* v. *B. & O. R. Co.*, 37 F. 2d 271, 272 (C. A. 6); *Sprinkle* v. *Davis*, 111 F. 2d 925, 931 (C. A. 4).

[19] *Norristown* v. *Moyer*, 67 Pa. 355; cf. *Roth* v. *Chatlos*, 97 Conn. 282, 288, 116 A. 332; *Workmen's Compensation Board* v. *Rutherford*, 59 Ont. L. Rep. 364, 367.

[20] *Bang* v. *International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 116; *Overland Construction Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6); *McCarthy* v. *Palmer*, 29 F. Supp. 585, 588–589 (E. D. N. Y.), affirmed, 113 F. 2d 721, 723 (C. A. 2), certiorari denied, 311 U. S. 680; *Hetrick* v. *Reading Co.*, 39 F. Supp. 22, 24–25 (D. N. J.).

liability, he can derive no advantage therefrom in mitigation of damages for which he is liable." Sutherland on *Damages*, 4th Ed. (1916), Vol. 1, Section 158, p. 487.

The common-law loss of earnings test had been adopted by tribunals which had, prior to adoption of the Wagner Act, been established by Congress to effectuate policies looking toward protection of employees against discharge for organizational activities.

Lost wages, sometimes specifically referred to as "back pay," had been awarded together with reinstatement by the National War Labor Board in 1918,[21] by the National Labor Relations Board acting under Section 7 (a) of the National Industrial Recovery Act,[22] and also by the only court faced with remedying a discharge in violation of

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[21] *Matter of Corn Products Refining Co.*, Docket No. 130, decided November 21, 1918, reported in U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletin No. 287 (Dec. 1921), National War Labor Board, pp. 183–184 (Gov't. Printing Off., 1922); *Matter of General Electric Co.*, Lynn, Mass., Docket No. 231, decided October 24, 1918, reported *ibid.*, pp. 243–244; *Matter of Georgia Railway and Power Co.*, Docket No. 159, decided December 5, 1918, reported *ibid.*, pp. 214–215.

[22] *Matter of Chicago Defender, Inc.*, 1 NLRB (old) 119, 122, decided October 20, 1934; *Matter of Ralph A. Freundlich, Inc.*, 2 NLRB (old) 147, 148; *Matter of Philadelphia Cleaners & Dyers, Inc.*, 2 NLRB (old) 223, 225; *Matter of Westport Lumber Co.*, 2 NLRB (old) 261, 262; *Matter of Portland Cleaning Works*, 2 NLRB (old) 420, 421; *Matter of Davis Tailoring Co.*, 2 NLRB (old) 427, 429; *Matter of Nelson McCoy Pottery Co.*, 2 NLRB (old) 494, 495.

an injunction issued under the Railway Labor Act.[23] These agencies, following the common law rule, deducted from their awards amounts which the employees had earned during the period of wrongful discharge. The orders of the War Labor Board in 1918 and provided for the deduction of "earnings during the interim"; they did not provide for any other deduction.[24] Orders of the old National Labor Relations Board, the immediate predecessor of the NLRB, also provided only for the deduction of earnings.[25]

Thus, both the common law courts and administrative agencies had adopted, as the measure of damages for a wrongful discharge, a test which looked exclusively to earnings and which disregarded both collateral losses incurred by the employee and collateral benefits received by him. In many instances that test may result in a failure to make the employee completely whole. Employees who are unlawfully discharged often suffer a host of collateral losses during their period of unemployment. Even assuming ultimate dollar for dollar reimbursement, the time lag between dismissal and reimbursement often causes irreparable injury because workers rarely have sufficient sav-

[23] *Brotherhood of Railway and S. S. Clerks* v. *Texas & N. O. R. Co.*, 24 F. 2d 426, 434 (S. D. Tex.), affirmed, 33 F. 2d 13 (C. A. 5), affirmed, 281 U. S. 548.

[24] See cases cited in footnote 21, *supra*.

[25] *Matter of Chicago Defender, Inc.*, 1 NLRB (old) 119, 122; *Matter of Davis Tailoring Co.*, 2 NLRB (old) 427, 429.

ings to tide them safely over sustained periods of unemployment; if they did there would be no need of employment insurance. And they often have heavy commitments for rent, insurance, and installment payments which they are unable to meet even with the aid of unemployment benefits. Thus, apart from profound injury to morale and self-esteem,[26] unlawful discharges may result in forfeiture of rights under installment contracts and insurance policies, in mortgage foreclosures, in eviction for rent delinquencies, in distress sales of property at sacrifice prices or forced borrowing at burdensome interest rates, not to mention short rations, lack of heat and clothing, impairment of health, and like consequences which may befall the employee and his family as a result of the unlawful discharge.[27] Some statutes have attempted to provide a rough measure of compensation for such losses by allowing awards of twice the back pay. (See *infra*, p. 59.)

By the same token, the refusal to allow a deduction for collateral benefits might in some instances result in the receipt by the employee of more than if he had not been wrongfully discharged. The common law rule, however, uniformly ignored these possibilities that the award might, in some cases, be substantially less than compen-

[26] See *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 113 F. 2d 232, 235 (C. A. 9).

[27] See Calkins, Clinch, *Some Folks Won't Work*, Harcourt, Brace & Company, New York, 1930.

satory, and in others more than compensatory, regarding it as sufficient to apply the simpler test of looking only at earnings lost and alternative earnings received in the belief that in general that test would result in approximate fairness.

B. CONGRESS, IN AUTHORIZING AWARDS OF "BACK PAY," CLEARLY CONTEMPLATED THAT THE AMOUNT OF SUCH AWARDS MIGHT BE BASED ON THESE COMMON LAW PRINCIPLES

In authorizing the Board to direct the employer to take "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," Congress, as we have seen, did not seek to impose any stereotyped formula. "The remedy of back pay, . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 198. In particular, this Court has made it clear that the relief which can be granted to the employee need not be limited to "questions of monetary loss." *Id.*, at 193. Nevertheless, the express authorization in the Act of an award of "back pay" is highly significant for present purposes. By indicating that "back pay" was an appropriate measure of the relief that might be afforded, Congress would seem clearly to have had in mind the kind and measure of relief that had been applied by the common-law courts and earlier administrative agencies. Congress contemplated that the employer guilty of unfair labor

practices, like the tortfeasor at common law,[28] could be required to "restore to the employees in some measure what was taken from them because of the Company's unfair labor practices." *Virginia Electric and Power Company* v. *National Labor Relations Board*, 319 U. S. 533, 543. As a permissible measure of such compensation, Congress clearly had in mind the standard of proven efficacy at common law. (See *Virginia Electric & Power Co.* case, *supra.*) The legislative history shows that Congress intended by using the phrase "back pay" to authorize the Board to award an unlawfully discharged employee "compensation for the *time that he has lost through unlawful discharge.*" [Emphasis added.][29]

The concept of "time lost" which is embodied in the phrase "back pay," was a direct outgrowth of the common law loss of earnings test which had been applied not only by the courts but by the early administrative tribunals in effectuating policies similar to those embodied in the Wagner Act. The test reflected a deliberate judgment of courts and administrative

[28] Cf. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862 (C. A. 2; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *Packard Motor Co.* v. *National Labor Relations Board*, 330 U. S. 485, 489.

[29] Memorandum Comparing S. 2926 (73d Cong.) with S. 1958 (74th Cong.), dated March 11, 1935, Senate Committee Print, 74th Cong., 1st Sess., p. 4, reprinted in Legislative History of the National Labor Relations Act, 1935 (Gov't. Print. Off. 1949), p. 1324.

agencies as to the measure of restitution appropriate to compensate for wrongful discharge; it was of proven workability and was easily integrated into the statutory scheme.

Congress' adoption of the "back pay" formula resulted from a deliberate choice between competing policies. Early versions of the bill which became the Wagner Act would have authorized the Board to measure awards to unlawfully discharged employees by such broad standards of absolute loss as "substantial justice" and "restitution."[30] Under those standards, had they been adopted, it could have been argued that Congress had rejected the common-law tests (which, as we have pointed out, were not always fully compensatory) and had required consideration of collateral losses suffered by the employee in addition to his loss of earnings. If such collateral losses were to be considered it might have been appropriate also to consider collateral benefits in mitigation of the employer's obligation. Congress, however, rejected these broad formula-

[30] S. 2926, Original Senate Print, 73rd Cong., 2nd Sess., Sec. 205 (c); S. 4958, Original Senate Print, 74th Cong., 1st Sess., Sec. 10 (d); S. 1958 as reported, 2nd Senate Print, 74th Cong., 1st Sess., Sec. 10 (c). These bills are reprinted in Legislative History of the National Labor Relations Act, 1935 (G. P. O., 1949), pp. 7, 1302, 2292, respectively. See Senate Memorandum Comparing S. 2926, 73d Cong., with S. 1958, 74th Cong., 1st Sess., pp. 4, 34, reprinted in Legislative History of the National Labor Relations Act, 1935, *supra*, at pp. 1324, 1360.

tions and provided instead for the award of "back pay", thus clearly authorizing the Board to apply the common-law rules under which collateral losses and collateral benefits were alike disregarded.

C. THE BOARD COULD PROPERLY DETERMINE THAT THE APPLICATION OF THE COMMON LAW RULES EXCLUDING COLLATERAL BENEFITS AND LOSSES FROM THE MEASURE OF A BACK PAY AWARD WAS APPROPRIATE TO EFFECTUATE THE PURPOSES OF THE ACT

As we have seen, Congress would appear to have contemplated that in allowing back pay it would be appropriate for the Board to be guided by the common law principles which exclude collateral losses and gains. Even absent any such indications in the legislative history of the Act, however, it would have been clearly appropriate for the Board to look to those principles for guidance.

The "back pay" which Congress, in Section 10 (c), authorized the Board to award to victims of discriminatory discharge was designed to serve essentially the same functions as an award of compensatory damages to one discharged in breach of a contract of employment. The back pay award "resemble[s] compensation for private injury" (*Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 543). Although the award is not made "in the interest of the employee, but in the interest of the public" (*Agwilines, Inc.* v. *National Labor*

Relations Board, 87 F. 2d 146, 151 (C. A. 5)), it is designed, like an award of damages, both to compensate for the injury and to discourage future wrongdoing.[31] Both functions serve in "vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197.

From its earliest days, the Board has applied the loss of earnings test, and its corollary that neither collateral losses nor collateral benefits may be considered, in fixing the amount of the back pay obligation.[32] It is the Board's practice to measure the sum due by the amount the employee would have

[31] The award of compensatory damages for illegal discharge at common law serves to compel "citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another." Pollock on *Torts*, 12th ed., p. 21; see also Austin on *Jurisprudence*, 5th ed., Vol. 1, Lecture XXII, p. 443, *et seq.* And while Congress eschewed fines and penalties there can be no doubt that it conceived the function of the back pay award in part as a deterrent "so that employers are less likely to engage in unfair labor practices." *National Labor Relations Board* v. *Carlisle Lumber Company*, 99 F. 2d 533, 538 (C. A. 9). See the concurring opinion of Mr. Justice Black and Mr. Justice Douglas in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S., at p. 14. Cf. *National Labor Relations Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260, 263 (C. A. 5).

[32] *Clinton Cotton Mills*, 1 NLRB 97, 121 ("losses of pay"); *Carlisle Lumber Company*, 2 NLRB 248, 278 ("loss of wages"); National Labor Relations Board, First Annual Report (1936), p. 129; *id.*, Second Annual Report (1937), p. 152.

earned but for the discharge, subtracting therefrom such sums as the employee earned (or failed without excuse to earn)[33] during the back pay period.[34] The Board does not take into account as increasing the employer's back pay obligation the manifold collateral losses which frequently flow from discriminatory discharges, such as distress sales of property, impairment of physical and mental health, forced borrowing at burdensome interest rates and the like (*supra*, p. 17). Concomitantly, the Board does not take into account as diminishing the employer's obligation receipts other than earnings by the discharged employee from such sources as home relief,[35] union relief,[36] veterans disability

[33] This provision was adopted in deference to this Court's decision in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177. As we have pointed out, amounts which the employee failed without excuse to earn are deductible at common law (see p. 17; *supra*). Hence, the *Phelps-Dodge* decision in this aspect confirms the appropriateness of looking to the common law standard as a guide. Moreover, wilful losses are deductible in conformity with the social objective of discouraging idleness and permitting full employment. As we have shown, *supra*, pp. 18–19, no such considerations warrant deduction of collateral benefits such as unemployment compensation.

[34] National Labor Relations Board, First Annual Report (1936), p. 129; *id.*, Second Annual Report (1937), p. 152; *id.*, Third Annual Report (1938), p. 202.

[35] *Vegetable Oil Products Co., Inc.*, 5 NLRB 52, 53; *Oil Well Mfg. Corp.*, 14 NLRB 1114.

[36] *Missouri-Arkansas Coach Lines, Inc.*, 7 NLRB 186, 206; *Berkshire Knitting Mills*, 17 NLRB 239.

compensation,[37] or unemployment compensation funds.[38]

The Board's practice is thus, as we have shown, essentially that of the common law courts.[39] While this Court has held that the Board's discretion in framing its remedial orders may not be fettered by "compelling it to observe conventional common law or chancery principles" (*Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 542), we know of no principle that precludes it from applying common law rules where they are deemed appro-

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[37] *Oil Well Mfg. Corp.*, 14 NLRB 1114; *Louis Hornick & Co., Inc.*, 2 NLRB 983.

[38] *Missouri-Arkansas Coach Lines, Inc.*, 7 NLRB 186, 206; *Jefferson Lake Oil Co., Inc.*, 16 NLRB 355, 405; *Walter Stover*, 15 NLRB 635, 651; *Pennsylvania Furnace and Iron Co.*, 13 NLRB 49, 55.

[39] Although adhering to common-law practice in determining allowable losses and deductions, the Board has recently announced a departure from the common-law rule on a question of method of computation. *F. W. Woolworth Co.*, 90 NLRB, No. 41. Under the new rule, the Board will compute back pay on a quarter-year period rather than on a total separation period basis. This rule was adopted because it has appeared that in some cases, under the total period method, high earnings received by the employee during the latter part of the back pay period served to wipe out the prior loss of earnings, thus giving employers an incentive to delay reinstatement as long as possible. By adopting the quarter-year period as the basis for computation, the Board has sought to eliminate such an incentive and thereby to promote the efficacy of the reinstatement remedy. Because the reinstatement remedy conferred by the Act was unknown to the common law, no comparable problem had been created in the application by the courts of the total period method.

priate to the effectuation of the Act's purposes. In the present situation the similarity of objective served by the practice in both forums—promotion of social policy by deterring wrongdoing and compensating the injured employee—establishes beyond question the rationality and appropriateness of its adoption by the Board.

The tested practicability of the rule itself commends its adoption. A rule of absolute loss would require the Board to take into account an infinite variety of incidental benefits which the discharged employee may have received—such as contributions from friends, relations, charities, union benefits, and relief payments—in whatever form and of whatever nature (including food, clothing, coal, etc.) which would not have been received but for the discharge. On the other hand, to be fair to the employee, the Board would also have to explore and give weight to innumerable collateral losses, both tangible and intangible. "Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge." *Virginia Electric & Power Co. v. National Labor Relations Board, supra,* 543. Whatever advantages might flow from such a rule in permitting a closer approximation to absolute restitution would, in the Board's view, be far outweighed by the administrative difficulties attendant upon its application. Hence the

Board was clearly justified in confining its inquiry to earnings.

The holding of this Court in the *Virginia Electric* case, *ibid.*, that it would be "wrong * * * to force [the Board] to inquire into the amount of damages actually sustained" is decisive of the Board's power to disregard both collateral losses and collateral benefits in computing loss of earnings. In that case the Court sustained the Board's refusal to consider, in mitigation of the employer's obligation to reimburse employees for dues illegally checked off by him, collateral benefits which, the employer argued, had accrued to the employees from the dues deductions. As in this case, the Board limited its consideration to the definite ascertainable losses of the employees involved; it "determined that the employees suffered a definite loss * * * and that the effectuation of the policies of the Act requires reimbursement * * * in full." The Court rejected the Company's contention that "this considered judgment [of the Board] does not effectuate the statutory purpose."

Apart from the decision of the court below, the only two courts of appeals which have considered the Board's practice of refusing to diminish the employer's back pay obligation by deducting collateral benefits have approved and sustained it. *National Labor Relations Board v. Marshall Field*

& Co., 129 F. 2d 169 (C. A. 7), affirmed on other grounds, 318 U. S. 253, and *National Labor Relations Board* v. *Brashear Freight Lines, Inc.*, 127 F. 2d 198 (C. A. 8). In the *Marshall Field* case the court sustained the Board's refusal to permit the deduction of unemployment compensation benefits from back pay award, saying (129 F. 2d, at p. 172):

> In ordering the respondent to pay the reinstated employees their lost wages less only net earnings, the Board has followed well-established rules of damages, long used in tort and contract actions.
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> In the Restatement of the Law of Torts, Sec. 924, Comment (e), it is said that: "The damages (for loss of earnings) are not reduced by the fact that the plaintiff has suffered no net financial loss as the result of the entire transaction, as where he receives insurance money or an amount equal to his lost wages from his employer or from a friend."
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> * * * * *
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> * * * The wrongdoer may not be benefited by collateral payments made to the person he has wronged.

In the *Brashear* case the Court of Appeals for the Eighth Circuit likewise found the common law analogy persuasive. The court there rejected the employer's claim that he had the right to deduct from the back pay due the value of grocer-

ies received by the discharged employee from his union. The court said (127 F. 2d 198, 199):

> * * * our order could not, we think be interpreted as intending to give the employer, found to be a wrongdoer, the benefit of gifts or other collateral benefits received by the former employee during his period of unemployment. If is enough that it is permitted to deduct what he earned as wages. The general rule that a tortfeasor is not entitled to reduction of damages because the injured one has had the benefit of insurance payments or other collateral benefits would seem to be analogous.

D. THE REENACTMENT OF THE BACK PAY PROVISIONS WITHOUT CHANGE IN THE TAFT-HARTLEY ACT IS A LEGISLATIVE RATIFICATION OF THE BOARD'S PRACTICE

This construction of the Act and of its powers thereunder, adopted by the Board immediately after the Act's passage and consistently adhered to since, is entitled to great weight in the interpretation of the Act. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294. Here that weight is greatly increased by the fact that Congress, in recent comprehensive amendments to the Act made after exhaustive study of the practical workings of its provisions, did not change the back pay provisions.

When Congress amended the National Labor Relations Act by the Labor-Management Relations Act, the Board had been following the practice

of disallowing deduction for collateral benefits such as unemployment compensation for a period of twelve years. The Board had repeatedly, in its Annual Reports, called the attention of Congress to this practice.[39] During this entire period the Board's practice had been challenged before courts of appeals in only two cases, and in both cases it had been sustained. Thus, at the time the Taft-Hartley Act was passed there was not only a history of uniform administrative policy and practice in the application of the back pay remedy, but uniform judicial approval of that policy and practice as well.

In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the Wagner Act as they had been applied by the Board.[41] Congress made extensive changes, many of which were dictated by dissatisfaction with policies which the Board had adopted.[42] Congress also considered the back pay provision, but amended it only by including a provision that back pay could be assessed against labor organizations as well as employers.[43] Under these cir-

[39] National Labor Relations Board, *Third Annual Report*, p. 202, n. 11; *Fourth Annual Report*, p. 100, n. 25; *Eleventh Annual Report*, p. 50.

[41] See 80th Cong., 1st Sess., House Report No. 245 on H. R. 3020 and Senate Report No. 105 on S. 1126.

[42] See 80th Cong., 1st Sess., House Conference Report No. 510 on H. R. 3020.

[43] *Id.*, at p. 54.

cumstances the inference is irresistible that it was because Congress approved the Board's practice that it reenacted the back pay provision without material change. Cf. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Norwegian Nitrogen Co.* v. *United States*, *supra*, 313–315.

II

THESE PRINCIPLES WERE CORRECTLY APPLIED TO DENY DEDUCTION OF THE UNEMPLOYMENT COMPENSATION RECEIPTS HERE INVOLVED

A. UNEMPLOYMENT COMPENSATION RECEIPTS ARE COLLATERAL AND NOT DIRECT BENEFITS

As we have seen, the Board's policy of disregarding collateral losses and benefits in the computation of back pay accords fully with the terms of the Act and effectuates its policy. The Company seeks to avoid the operation of this rule, however, by contending that the unemployment compensation benefits here involved are "direct" rather than "collateral." In support of this position, it has argued that what the employee receives from the fund during unemployment comes from the employer's payments.

In the first place it should be pointed out that courts applying the common law "loss of earnings" test have uniformly held that unemployment compensation benefits and railroad retirement annuities, to which the employer has

contributed, are collateral and not direct." And the Court of Appeals for the Seventh Circuit specifically held in the *Marshall Field* case, *supra*, at pp. 172–173, that despite the employer's contribution to the fund, the employer does not have "such an interest in the payments that they should be credited to its account." The court pointed out (*ibid*):

> The benefits in question were paid by the State, not by respondent. How the State raised the funds is a matter between the State and its taxpayers.

These holdings are manifestly sound. Benefits other than earnings paid to discharged employees are deemed direct rather than collateral only when "procured by the [employer]" or where they have "been paid or received to satisfy in whole or part his liability."[45] It is true that employers are taxed to maintain the Louisiana Unemployment Compensation Fund, from which benefits are paid to unemployed persons. But employers do not, by paying their taxes, *pro tanto* purchase immunity from responsibility for the injuries they inflict by unlawfully discharging employees. It may be doubted whether an employer could lawfully purchase an insurance policy to indemnify himself against the risks of

[44] See note 20, *supra*.

[45] Sutherland on *Damages*, *supra*, Sec. 158, p. 488.

such unlawful conduct.[36] Yet to treat unemployment compensation payments as benefits attributable to the employer and deductible from his back pay obligation would in effect transform the unemployment compensation system into a form of insurance against the consequences of violating the National Labor Relations Act. It is apparent that such a result would tend to minimize the risks involved in illegally discharging employees, thereby encouraging would-be violators of the Labor Relations Act, in the teeth of Congressional policy.

Unemployment compensation laws were not designed for any such purpose. Unemployment compensation is not simply a mass insurance of private risks; it is social insurance. It is part of a nationwide system created by statute and enforced by public agencies to achieve broad social and economic objectives. Those objectives can be found stated not only in the policy statement of the Louisiana law (Dart's Sec. 4434.1), but in that of practically every state unemployment compensation law.[37] Such laws provide a means of systematizing and rationalizing haphazard methods for relieving distress

[36] At common law a contract to save the promisee harmless from the consequences of an unlawful act is against public policy and invalid. Williston on *Contracts*, (Rev. ed.), Sec. 1751. *Restatement, Contracts*, Sec. 572.

[37] These laws are compiled in Commerce Clearing House, *Unemployment Insurance Service*.

resulting from technological, seasonal, cyclical, and other types of economic unemployment which have become "a permanent incident of our industrial system." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 515–516. They also tend to encourage employers to stabilize employment practices and generally provide for more favorable economic conditions by maintaining the purchasing power of the community.[48]

Although wrongfully discharged employees share with the victims of other types of unemployment in the benefits of the fund, it is apparent that the wrongdoing employer cannot, consistently with the objectives of the federal social security policy, the Louisiana Act or the National Labor Relations Act, claim credit for the payment of the benefits. To permit him to do so would permit him, in derogation of the policy embodied in the Labor Relations Act, to shift from himself to the fund his obligation to make restitution for the injury he has inflicted. Such a result would also pervert the basic objectives of the social security policy to foster stable employment and minimize the risks of economic insecurity, by diverting the unemployment compensation funds to the unintended function of insuring employers against the consequences of illegal discharges.

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[48] Clague, Ewan, *The Economics of Unemployment Compensation* (1945), 55 Yale Law Journal 53, 69.

The fact that the unemployment compensation system is financed by taxes levied on employers is purely incidental to its purpose and effect. "The Unemployment Compensation Act is primarily a public welfare measure and the levying of taxes thereunder is merely incidental to its purpose, which is to assure a measure of security against the hazard of unemployment in our economic life." *Unemployment Compensation Commission* v. *Collins*, 182 Va. 426, 438, 29 S. E. 2d 388, 393. Indeed, the method by which unemployment compensation funds are financed varies with different parts of the program and in different states. While in most states, as in Louisiana, unemployment compensation is financed entirely by employer contributions, in a few states employee contributions are also made (C. C. H. *Unemployment Insurance Reporter*, Vol. 1, Charts, pp. 4111–4112.)[40] Although state law may characterize the

[40] In view of this fact the Company's position would create endless uncertainties. Would the employer have a different rule apply for a State where an employee makes a contribution under the unemployment compensation law? And if so, would there be an apportionment of the mitigation in terms of relative proportions of the employer contributions and the employee contributions? Would a different rule apply for old-age and survivors insurance where contributions by employers and employees are joined by contributions from the general fiscal resources of the Federal Government? And if so, would a different rule apply with respect to the operations of old-age and survivors insurance during the early years of the program when a special bounty is given to aged individuals, than would apply to the later years of the program when normal actuarial principles operate?

employer's payments made to an unemployment compensation fund as "contributions" and although a state may have chosen to raise the fund by levies only on employers rather than on general public, this Court has recognized that the employers' payments are none the less "taxes." *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 508–509; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578–583. Clearly, the fact that the employer is compelled by the state to pay taxes which the state uses to finance its program of unemployment compensation, is not sufficient to stamp the fund with a private rather than a public character, or to attribute to the employer directly, payments which the state makes from the fund.[50] In the *Carmichael* case, *supra*, this Court, speaking

[50] See the statement of the New York Court of Appeals discussing the New York unemployment compensation law (*Matter of Cassaretakis*, 289 N. Y. 119, 126, 44 N. E. 2d 391, 394–395, affirmed *sub nom. Standard Dredging Co.* v. *Murphy*, 319 U. S. 306):

"This tax is an excise based upon the exercise of the privilege of employing individuals. * * * The obligations of the employer under the law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever become entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute."

of the Alabama Unemployment Insurance tax, stated (301 U. S. at pp. 522–523):

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * * Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.

That payments to discharged employees out of the unemployment compensation fund are not attributable to the wrongdoing employer's contributions is further demonstrated by the fact that under the Louisiana law, as under most such laws, the employer's contributions are not segregated, but are placed in a pooled fund deposited with the Secretary of the United States Treasury, out of which benefits are paid. (Dart's, Sec. 4434.8, Appendix, 71, *infra*.) The law specifically provides that "All moneys in the fund shall be mingled and undivided" (*ibid.*) and that neither the employer nor the employee shall have any prior claim to the monies paid into the fund by the employer (Dart's Sec. 4434.6 (c) (1), Ap-

pendix, 68, *infra*). Here, as in the *Marshall Field* case, 129 F. 2d 169, 173, "Respondent is not the only employer who is taxed under the [Louisiana] Act, nor are benefits to its discharged employees limited to the amounts paid by respondent." (Dart's, Sections 4434.2 (a) (b) (c) and (d), Appendix, 64–66, *infra*). It is therefore impossible to trace or establish any connection between the tax paid by the employer and the benefit collected by the employee.[51]

Finally, it should be noted, the Company would have had to pay the same amount of tax even if Louisiana had never enacted the law under which benefits may be paid to its employees. The Federal Unemployment Tax Act (49 Stat. 636, amended 53 Stat. 1387, 1388, 26 U. S. C. 1600–1601, Appendix, 63, *infra*) imposes a tax of 3 percent on each employer's pay roll, but permits him to deduct therefrom taxes paid to a State unemployment compensation fund up to 90 percent of the Federal Tax. The Louisiana tax of 2.7 percent is 90

[51] Indeed, the discharging employer may never even be charged, for purposes of computing his experience rating, with the benefits paid to the employee discharged by him. Under the Louisiana Law only base period employers are chargeable with benefits paid a claimant (Dart's Sec. 4434.6 (c) (1), Appendix, 68, *infra*). Since the base period comprises the *first four* of the last five quarters immediately preceding the date of the claim for benefits, an employer may discharge a newly hired employee and suffer no charges against his rating account. (Dart's Sec. 4434.18 (o) and (p), Appendix, 74, *infra*).

percent of the Federal tax (Dart's, Sec. 4434.6 (c) (2) (3), Appendix, 68–69, *infra*).

In sum, the company's argument that it is entitled to deduction merely because it has contributed to the fund from which the unemployment compensation benefits were paid is no more valid than a corporate taxpayer's claim that it should receive a tax refund because it has no children who use the public schools.[32] As the court pointed out in the *Marshall Field* case, *supra*, at page 173, "if the benefits had been paid by a private charitable organization to which respondent had contributed, surely respondent would not claim that it had such an interest in the payments that they should be credited to its account."

In support of its argument that the benefit payments flow directly from its contributions to the fund petitioner asserts that its rate of contribution is very greatly affected by the amount of unemployment compensation benefits which discharged employees receive. Even assuming the soundness of this assertion, it would not establish that the benefits were direct rather than collateral. For the benefits are paid by the State, not by the Company. "If the unemployment fund had been raised by general taxation, surely [the company] could not contend successfully that the benefits were not collateral because their payment might increase its rate of tax". *National Labor Rela-*

[32] Cf. *Thomas* v. *Gay*, 169 U. S. 264, 280.

tions Board v. *Marshall Field & Co.*, 129 F. 2d 169, 173 (C. A. 7). The fact that the fund is raised by special tax levied only upon employers rather than by a general tax does not establish that the taxpayer has such an interest in the proceeds as to enable him to claim that the disbursement is made on his behalf rather than on behalf of the state. *Carmichael* v. *Southern Coal Co.*, *supra*, pp. 522–523. That funds to finance the unemployment compensation system are obtained by taxes levied on employers only does not mean that the unemployment compensation system was conceived of as a financial responsibility law, designed to insure that employers would meet some legal obligation to employees whom they discharge. The law imposes no such obligation unless the discharge was wrongful. The tax was levied only on employers and the tax rate was designed to vary with the amount of unemployment chargeable to each employer, not because employers were thought to be financially liable to all employees whom they dismiss, but because it was believed that such a plan would tend to effectuate the Act's policy of stabilizing employment by discouraging layoffs and discharges.[53]

There is a further reason why the Board would be justified in disregarding any possible effect of

[53] Arnold, Almon R., *Experience Rating* (1945), 55 Yale Law Journal 219–223. For other reasons leading to the decision to tax employers only, see Millis & Montgomery, *Labor's Risks and Social Insurance* (McGraw Hill, 1938), p. 161.

its award on the Company's state tax rate. Any additional taxes would be the result of state, not federal law, designed to effectuate a wholly different public policy from that which the Board is charged with enforcing. Cf. *Frick, et al.* v. *Pennsylvania*, 268 U. S. 473, 498–9; *United States* v. *Lanza*, 260 U. S. 377, 382; *California* v. *Zook*, 336 U. S. 725, 738. As the Court pointed out in the *Marshall Field* case, *supra*, "if the payment of the benefits increases respondents' tax rate, the increase is caused not by the order of the Board, but by the law of the State" (129 F. 2d at p. 173). As this Court has held in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, it is not the function of the Board, in framing its orders, to concern itself with the effectuation of policies of other governmental agencies.

In any event, the Company's assumption that an employer's tax rate is automatically affected by benefit payments to wrongfully discharged employees is without foundation. Under the Louisiana Law, whether an employer's rate of contribution may be reduced below the maximum rate of 2.7 percent, is dependent upon a variety of complex factors. The first relates to the solvency of the state fund. No employer's rate may be reduced unless the total amount in the State fund equals or exceeds 35 million dollars or 1.5 percent

of the total pay rolls subject to the Act for the last 5 consecutive calendar years, whichever is greater (Dart's, Sec. 4434.6 (c) (6), Appendix, 70, *infra*). The second relates to the length of time the particular employer participated in the unemployment compensation system. Thus, no employer's rate may be reduced from 2.7 percent unless it was chargeable with benefits throughout the 36 consecutive calendar months ending on the computation date. (Dart's, Sec. 4434.6 (c) (3), Appendix, 68–69, *infra*).

The third relates to the relative amount of unemployment attributable to the particular Company. In order to qualify for a reduced rate of contribution the employer must have a favorable experience rating (Dart's, Sec. 4434.6 (c) (1) (2) (3) (4) (I), Appendix, 68–70, *infra*). The two elements crucial in computing the experience rating are the amount of contributions which the employer has paid into the fund and the amount of benefits which have been charged against him. The accumulated amount of benefits charged to the employer since the beginning of the program are subtracted from the accumulated contributions and the result (known as excess) is divided by the average annual pay roll of the employer for the 3 years preceding the rating period (*ibid.*). The resultant ratio determines the employer's

contribution rate.[54] In view of these complex factors which enter into the determination whether particular discharges affect any employer's rate it becomes pure speculation to argue, as the Company has, that the amount of unemployment compensation benefits received by these discharged employees will very greatly affect the company's rate of contribution.

Moreover, had the Company's rate of tax actually been affected by the payment of benefits to the discharged employees the Company could have introduced evidence of such change in this proceeding. The Company at no time offered evidence before the Board or the Court below that any such change had occurred or would occur. Since information as to this matter was peculiarly within the employer's knowledge, it is fair to assume that no change occurred.[55]

Finally, to whatever extent charges against the employer's account resulting from payments

[54] During the experience rating year beginning October, 1947 (the discharges here involved occurred in May, 1948), this contribution rate was 2.7, the maximum, where an employer's ratio of excess to average annual pay roll was less than 4.9 percent. Where an employer's ratio was between 4.9 and 5.44, the rate of contribution dropped three tenths of one percent to 2.4 percent. The rate of contribution was gradually scaled down to a minimum of nine-tenths of one percent where an employer's ratio was 7.6 percent or more (Dart's, Sec. 1434.6 (c) (4) (1) (c), Appendix, 69–70, *infra*).

[55] See *Interstate Circuit, Inc., et al.* v. *United States*, 306 U. S. 208, 226; *Clifton* v. *United States*, 4 How. 242, 247.

to the discharged employees may have adversely affected the employer's experience rating, those charges might be expunged, upon the employer's payment of back pay under the Board's order. Under the decision of this Court in *Social Security Board* v. *Nierotko*, 327 U. S. 358, 364–367, "back pay" awarded under an order of the Board constitutes "wages," and the recipient of a back pay award is not deemed to have been unemployed during the back pay period. Upon the issuance of such an order the employer may call the attention of the state unemployment compensation board to this fact, which establishes that the employee was, as a matter of law, in employment status during the benefit perio ', and request that the charges against his account be expunged in the light of this subsequently acquired informatiofi.[56]

[56] The Louisiana Law permits an employer to contest amounts charged to his experience account (Dart's, Sec. 4434.6 (c) (8), 4434.13 (f) (1), Appendix, 71, 73, *infra*). Although the former Section requires the employer to file his claim for review of charges against his account within 30 days from notification of those charges, an employer whose claim grows out of an order issued by the Board long after the discharges took place and after the benefits were paid, could perhaps argue that the 30 day limitation was inapplicable because the grounds for review did not arise until after expiration of the usual period. Section 4434.13 permits the employer to apply for a refund in the case of contributions erroneously collected within three years after the date of payment, and this Section might be deemed applicable also to a meritorious claim for review of charges.

B. THE EMPLOYEE IS NOT MADE MORE THAN WHOLE BY THE BOARD'S ORDER

In *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 9, this Court recognized that the remedial function of a back pay order was "to make the employees whole" for loss of earnings occasioned by their illegal discharge. The Court explained that "The amounts *earned* by the employees [after discharge but] before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole." [Italics added.]

In that case the "make-whole" principle required deduction of amounts received by discharged employees, though paid by governmental agencies, because they were earnings. And the Court clearly indicated that it was the character of the payments as "earnings" which led to their deductibility, for it emphasized that "the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid."

While the "make-whole" principle thus requires deduction from the back pay obligation of interim earnings, regardless of their source, it neither contemplates nor permits deduction of collateral benefits, other than earnings, received from persons

other than the employer. This result is inherent in the concept of the "make-whole" remedy as compensation for loss of earnings. Since, in computing the employer's gross back pay obligation, only loss of earnings is considered, collateral losses to the employee being disregarded, consistency requires that collateral benefits to the employee should not be considered as diminishing the back pay obligation. To allow collateral benefits to reduce the award, while not allowing collateral losses to increase it, would be manifestly unfair.

The Company's argument that denial of deduction of unemployment compensation benefits results in an award which makes the employee more than whole thus rests upon the fallacious premise that, in computing the employee's net loss attributable to the discharge, collateral benefits but not collateral losses should be considered. Such a rule, as we have shown (*supra*, pp. 26–27, 31) would be manifestly unfair and wholly incompatible with the policy of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 197–198. Unless employees are to be made whole for collateral losses such as those suggested above (*supra*, p. 23), it is manifestly unsound to argue that failure to deduct collateral benefits such as unemployment compensation will result in the employee's being made more than whole.

Moreover, to treat sums received from unemployment compensation funds as an offset to the loss

which wrongfully discharged employees sustain is to overlook the fact that such sums may ultimately be recovered by the state from the employee to whom back pay has been awarded. As the court pointed out in the *Marshall Field* case, 129 F. 2d, at 173, whether recipients of back pay should also be permitted to retain sums paid to them out of the State unemployment insurance fund is "a question between the employees and the [State] * * *." When it appears that employees to whom benefits were paid have, as a matter of law, not been unemployed and have in fact received wages in the form of back pay from their employer, see, p. 49, *supra*, the state may seek to recoup the unemployment compensation benefits, as having been improvidently granted. Subsequent to this Court's holding in the *Nierotko* case, *supra*, a number of states have recouped unemployment insurance benefits in circumstances such as these. Thus, the New York Supreme Court, Appellate Division, upheld an order directing such recoupment, holding that since the employees had been awarded back pay by order of the National Labor Relations Board, for the period of separation they did not suffer "total unemployment" within the meaning of the New York Act and hence were not entitled to retain the unemployment compensation benefits.[37] To treat

[37] *Frances T. Skutnik, et al. v. Edward Corsi, as Industrial Commissioner*, 51 N. Y. S. 2d 741. To the same effect see Decision of California Unemployment Appeals Board, March 3, 1948, No. 8169, Reported in Unemployment

unemployment compensation benefits which the state may ultimately recoup from the employee as an offset to the employer's back pay liability would thus result not only in making the employee less than whole, since collateral losses are not considered, but in depriving the employee even of back wages in a sum equivalent to the unemployment compensation benefits which the state recoups.

This argument is not affected by the fact that Louisiana may choose as a matter of policy not to recoup unemployment compensation benefits. The Board is empowered to decide as a matter of federal law whether unemployment compensation benefits should or should not be deducted from its back pay awards, and its policy need not vary with the divergent policies of the several states with regard to recoupment.[38]

Finally, aside from the possibility of recoupment by the states, receipt of unemployment compensation benefits results in losses to the employee which militate against deduction of such benefits

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Compensation Interpretation Service, Benefit Series, Vol. 11, No. 11, Nov. 1948, pp. 19–21; Decision of New Jersey Board of Review, May 31, 1949, No. Br–15077–C, Reported in Unemployment Compensation Interpretation Service, Benefit Series, Vol. 12, No. 10, October 1949, pp. 120–121.

[38] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 122–124; *Bethlehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, 774–777; *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953, reversing 255 Wis. 285, 38 N. W. 2d 688 (Wis. Sup. Ct.).

from the amount of back pay due. Each period of unemployment suffered by a worker reduces in a number of respects the amount he may thereafter recover. The insurance created by the Louisiana Unemployment Compensation Law is of a limited type, dependent for its future availability upon continued employment, and is exhaustible *pro tanto* by payment of benefits (Dart's, Sec. 4434.2 (b), (d) and 4434.3 (e), Appendix, 65, 66, 67, *infra*). The maximum an unemployed person can receive, in any benefit year, is 20 times his weekly benefit amount or one-third of his wages during the base period, whichever is less (Dart's, Sec. 4434.2 (d), Appendix, 66, *infra*), so that each weekly payment received by an unemployed person reduces *pro tanto* the amount of benefit payments which he would be entitled to receive should he again become unemployed during the benefit year. And since the period of unemployment is part of the "base period" during which the employee must be employed in order to draw future benefits he might not be able to draw any benefits for a period of time thereafter. Thus, under the Louisiana Law, an individual must have earned not less than thirty times his weekly benefit amount in his base period in order to be entitled to *any* benefits in the succeeding benefit year (Dart's Sec. 4434.3 (e), Appendix, 67, *infra*). If a period of unemployment following a discriminatory discharge continues throughout a whole calendar year, the individual would have no right to unemploy-

ment benefits for the following year. If it does not continue throughout a calendar year and the individual is able to draw additional benefits, the total amount he could draw would be lower because of the discharge, since the wages received during the base period afford the measure by which both the size of the weekly benefit payment and the maximum amount of benefits any individual may receive in any one year are computed (Dart's, Sec. 4434.2 (b) (d), Appendix, 65, 66, *infra*). In short each time that a worker, wrongfully discharged, is required to draw upon his unemployment compensation, he reduces the reserves otherwise available for a subsequent period of unemployment.

In addition, if the employer is permitted to deduct benefits from back pay, the employee's standing under the Federal Old Age and Survivors Insurance program would be prejudiced. The size of the retirement pensions and survivors benefits receivable by the employees or their survivors is directly dependent upon the total wages earned by the employees. Under this Court's decision in the *Nicrotko* case, *supra*, back pay is credited to the employee's social security account as wages. Hence, to the extent that the back pay award is reduced by the deduction of unemployment insurance benefits, the employee's social security account is impaired.

In sum, as we have shown, the Company's argument that the nondeduction of unemployment

compensation benefits results in making the employee more than whole is untenable. As the court pointed out in the *Marshall Field* case, 129 F. 2d 169, 172, "The mere fact that [recipients of back pay awards] may possibly receive more money for the period of their unemployment than they would have received if employed does not of itself affect the question." For this comparison overlooks the collateral losses which the dischargee may have suffered, which, if considered, would establish that the employee does not profit from the discharge. It overlooks also the fact that unemployment benefits are not necessarily retained by the employees, and, in any event, that the receipt of unemployment compensation is itself accompanied by collateral disadvantages to the employee.

The Board's loss of earnings test, which excludes both collateral losses and collateral benefits from computation thus does result in a measure of compensation which fairly approximates the losses directly attributable to the discharge. "Even in private litigation, the courts will not impose an absolute standard of accuracy. * * * Certainty as to the amount goes no further than to require a basis for a reasoned conclusion.'" *F. W. Woolworth* v. *National Labor Relations Board*, 121 F. 2d 658, 663 (C. A. 2). Since the Company "by its unlawful conduct, has made it

impossible to do more than approximate the conditions which would have prevailed in the absence of discrimination," (*Woolworth* case, *supra*), it is in no position to complain because, if some absolute measurement were possible, the ultimate total might have been found to be greater or less than that fixed by the Board's order.

C. THE BOARD'S ORDER IS NOT PUNITIVE

Finally, the Company argues that the Board's order, insofar as it fails to permit deduction of unemployment benefits, is "punitive." The court below apparently reached the same conclusion, for the sole support which it cited for its action in modifying the Board's order to permit such deduction was this Court's decision in *Republic Steel Corp.* v. *National Labor Relations Board*, *supra*.

The argument that non-deduction of unemployment benefits makes the Board's order punitive was flatly rejected by the Seventh Circuit in the *Marshall Field* case. As the court there stated (129 F. 2d, at 172, 173):

> The only substantial question in this case is whether the order penalizes the respondent. The Act is remedial, and the Board is without power to inflict a penalty upon an employer, even though it believes that such action would effectuate the purposes

of the Act. *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7.

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* * * In private contract or tort cases involving loss of employment * * * the amount of damages recoverable is not affected by collateral benefits paid to the injured person. Yet in these cases, the award is not of punitive damages, but of compensatory damages, the purpose of which is to make the injured party whole. * * *

* * * * *

We hold that * * * the order was within the powers of the Board.

To argue that an award of back pay, undiminished by deduction of collateral benefits, is compensatory when made by a court or jury but punitive when made by the Board, is groundless on its face. As long as the remedy is designed to compensate the injured party in a measure approximating his loss, rather than to impose a burden on the wrongdoer without regard to the amount or character of loss inflicted, the remedy may not be said to be punitive.[59] "The fact that the Board may only have approximated its efforts to make the employees whole, * * * does not convert this reimbursement order into the imposition of a penalty" *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 544.

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[59] 1 Am. Jur. 431, Actions, Sec. 39.

The courts have repeatedly been confronted with the question whether a statute which prescribes as compensation to an employee for wrongful discharge an amount arbitrary in character and larger than the wages which would have been earned during the period covered, is thereby made penal. In these cases the courts have pointed out the difficulty of measuring in terms of ordinary wages the total loss suffered by an employee who is left for a period of time without his usual source of income, and have held that a rate of recompense of double the amount of wages wrongfully withheld, or of a minimum of a month's wages without regard to how short a period the employee was out of work, was a reasonable method of compensating for the wrong, and did not constitute a penalty.[60] *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583; *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379, 143 N. E. 226; *Calvin* v. *Huntley*, 178 Mass. 29, 32, 59 N. E. 435, 436; cf. *Robertson* v. *Argus Hosiery Mills, Inc.*, 121 F. 2d 285, 286 (C. A. 6), certiorari denied, 314 U. S. 681.

The decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 13, does not support the view of the court

[60] "There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. * * * It will hardly be claimed that these are penal actions requiring the application of different rules * * * from those that prevail in other actions for indemnity." *Stockwell* v. *United States*, 13 Wall. 531, 547. Compare *Crary* v. *Porter*, 157 F. 2d 410, 414 (C. A. 8).

below. Rather, in adopting the "earnings" test (see *supra*, p. 50), it supports the view of the Board and of the Court of Appeals in the *Marshall Field* case, *supra*. The *Republic Steel* case presented no question of deductibility of collateral benefits from back pay. Earnings and wilful losses were deducted under the terms of the Board's order from the sums to be paid to the employees. The Board, while deducting work relief earnings from the back pay due the discharged employees, ordered the employer to pay a sum equivalent to those earnings to the work relief agencies for whom the services had been performed. The Court held that since the order requiring such payments by the employer to the relief agencies was not designed to make employees whole for losses sustained by them as a result of the unlawful discharges, but to compensate the agencies for expenditures which but for the illegal discharge would not have been made, it was punitive and therefore exceeded the Board's powers under the Act. The Court said (311 U. S., at 13) the Board "has not been assigned a role in relation to losses conceived to have been sustained by communities or governments in connection with work relief projects."

The Board's order in the instant case, on the other hand, does not undertake to require payments by the employer to anyone other than the discharged employee. The measure of payment

required of the employer, as we have shown, is limited to the amount which the Board deems necessary to make employees whole; the order seeks to effectuate no policy other than compensation of discharged employees for wage losses they have suffered. The order reflects the Board's reasoned judgment that to permit the employer to deduct unemployment compensation benefits from the back pay due would defeat the policy of Congress in authorizing the back pay remedy. For reasons already stated we think that judgment was clearly one which the Board had authority to make.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed, and the Board's order enforced without modification.

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NOVEMBER, 1950.

APPENDIX

The pertinent provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, et seq.) are as follows:

> SEC. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *.
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The pertinent provisions of the Federal Employment Tax Act (53 Stat. 1387, 1388, 26 U. S. C. 1600–1601) are as follows:

> SEC. 1600. RATE OF TAX.
>
> Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.
>
> SEC. 1601. CREDITS AGAINST TAX.
>
> (a) CONTRIBUTIONS TO STATE UNEMPLOYMENT FUNDS.—
>
> (1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.
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> (c) LIMIT ON TOTAL CREDITS.—The total credits allowed to a taxpayer under this subchapter shall not exceed 90 per centum of the tax against which such credits are allowable.

The pertinent portions of the Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat., 1949, § 4434.1 et seq.) are as follows:

> 4434.1. Declaration of state public policy.—As a guide to the interpretation

and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons. [Acts 1936, No. 97, § 1; 1938, No. 164, § 2.]

4434.2. Payment of benefits.—(a) Payment of Benefits. All benefits provided herein shall be payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the administrator may prescribe.

(b) Weekly Benefit Amount.

(1) Weekly Benefit Amount. An individual's weekly benefit amount shall be an amount equal to $\frac{1}{26}$ of his total wages for insured work paid during that quarter of his base period in which such total wages were highest, except that if such amount is more than $25.00, the weekly benefit amount shall be deemed to be $25.00, or if less than $5.00 shall be deemed to be $5.00, and if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

(2) Weekly Benefit. Each eligible individual who is employed [unemployed] in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less than part of the wages (if any) payable to him with respect to such week which is in excess of $3.00. Such benefit, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00

(c) Payment of Benefits for a Fractional Week. Notwithstanding any other provisions of this act the administrator may by regulation prescribe that the existence of unemployment, eligibility for benefits and the amount of benefits payable shall be determined, in the case of any otherwise eligible claimant who, within a week of unemployment is separated from, or secures, work on a regular attachment basis, for that portion of the week occurring before or after such separation from or securing of work, provided such regulations are reasonably calculated to secure, general results substantially similar to

those provided by this act with respect to weeks of unemployment.

(d) Duration of Benefits. Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) twenty times his weekly benefit amount, and (2) one-third of his wages for insured work paid during the base period; provided that such total amount of benefits, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00. For the purposes of this section, wages shall be counted as "wages for insured work" for benefit the purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by whom such wages were paid has satisfied the condition of section 18 (f) [§ 4434.18] or section 7 (e) [§ 4434.7] with respect to becoming an employer.

* * * * *

4424.3. Benefit eligibility conditions.—An unemployed individual shall be eligible to receive benefits with respect to any week only if the administrator finds that:

(a) He has made a claim for benefits in accordance with the provisions of section 5 (a) [§ 4434.5] of this act.

(b) He has registered for work at, and thereafter has continued to report at, an employment office in accordance with such regulations as the administrator may prescribe, except that the administrator may, by regulation, waive or alter either or both of the requirements of this subsection as to such types of cases or situations with respect to which he finds that compliance with such requirements would be oppres-

sive, or would be inconsistent with the purposes of this act; provided that no such regulation shall conflict with section 2 (a) [§ 4434.2] of this act.

(c) He is able to work, and is available for work.

(d) He has been unemployed for a waiting period of one week. No week shall be counted as a week of unemployment for the purpose of this subsection;

(1) Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits, provided that this requirement shall not interrupt the payment of benefits for consecutive weeks of unemployment.

(2) If benefits have been paid with respect thereto.

(3) Unless the individual was eligible for benefits with respect thereto as provided in section[s] 3 and 4 [§§ 4434.3, 4434.4] of this act, except for the requirements of this subsection and of subsection (e) of section 4 [§ 4434.4].

(e) He has during his base period been paid wages for insured work equal to not less than thirty times his weekly benefit amount. For the purposes of this subsection, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by which such wages were paid has satisfied the conditions of section 18 (f) [§ 4434.18] of section 7 (e) [§ 4434.7] with respect to becoming an employer. [Acts 1936, No. 97, § 3; 1938, No. 464, § 2; 1940, No. 11, § 3; 1944, No. 160, § 1.]

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4434.6. Contributions.—* * *.

(c) Contribution Rates Based on Ratio of Reserve to Pay-Rolls.

(1) The administrator shall prepare and maintain an experience-rating record for each employer, and shall credit such record with all the contributions paid by him with respect to wages paid for the calendar quarter beginning October 1, 1941 and for each calendar quarter thereafter. Nothing in this act shall be construed to grant any employer or individuals performing services for him prior claims or rights to amounts paid by the employer into the fund. The administrator shall terminate the experience-rating record of an employer who has ceased to be subject to the Louisiana Unemployment Compensation Law, or may do so provided the employer has had no employment in this state for a period of three consecutive calendar years. Benefits accruing and paid on and after October 1, 1941 to an individual in accordance with the provisions of the Louisiana Unemployment Compensation Law shall be charged against the experience-rating records of his base-period employers. The amount so chargeable against each base period employer's experience-rating record shall bear the same ration to the total benefits paid to an individual as the base-period wages paid to the individual by such employer bear to the total amount of base-period wages paid to the individual by all his base-period employers; provided, however, that all such charges may be computed to the nearest multiple of one dollar ($1.00).

(2) The standard rate of contribution payable by each employer shall be 2.7 per centum, except as hereinafter provided.

(3) No employer's rate shall be varied from 2.7 per centum for any experience-rating year unless his experience-rating record could have been charged with benefits throughout the 36-consecutive-calendar-month period ending on the computation date. An employer's record shall in no event be deemed to have been chargeable with benefits during any period prior to the first day of the calendar quarter which precedes the quarter within which he made his first contribution payment.

(4) The administrator shall for the experience-rating year beginning October 1, 1945, and for each experience-rating year thereafter determine the contribution rate of each employer who has met the requirements specified in paragraph (3) of this subsection on the basis of his experience-rating record, in the following manner:

(I) If the total of an employer's contributions paid on or before April 25, immediately succeeding the computation date with respect to wages paid by him on or prior to the computation date, exceeds the total benefits which were chargeable to his experience-rating record, and were paid on or before such April 25, with respect to weeks of unemployment beginning prior to the computation date, his contribution rates for the ensuing experience-rating years, subject to suspension as hereinafter provided in subsection (c) (6), shall be as follows:

* * * * *

(C) With respect to the experience-rating year beginning October 1, 1947:

(a) 2.7 per centum if such excess is less than 4.90 per centum of his average annual pay-roll;

(b) 2.4 per centum if such excess equals or exceeds 4.90 per centum but is less than 5.44 per centum of his annual pay-roll;

(c) 2.1 per centum if such excess equals or exceeds 5.44 per centum but is less than 5.98 per centum of his average annual pay-roll;

(d) 1.8 per centum if such excess equals or exceeds 5.98 per centum but is less than 6.52 per centum of his average annual pay-roll;

(e) 1.5 per centum if such excess equals or exceeds 6.52 per centum but is less than 7.06 per centum of his average annual pay-roll;

(f) 1.2 per centum if such excess equals or exceeds 7.06 per centum but is less than 7.60 per centum of his average annual pay-roll;

(g) .9 per centum if such excess equals or exceeds 7.60 per centum of his average annual pay-roll.

* * * * *

(6) No employer's rate shall be varied from the 2.7 per centum rate during any calendar year unless, as of the last day of the preceding calendar year, the total amount available for benefits in the Louisiana Unemployment Compensation Fund equals or exceeds 1.5 per centum of the total pay rolls subject to contributions under the Louisiana Unemployment Compensation Law as ascertained from the records on file with the division of employment security for the last five consecutive calendar years ending on the last day of the calendar year as above set forth, or thirty-five million dollars ($35,000,000.00), whichever is the greater.

* * * * *

(8) The Administrator shall, not later than October 1 of each year, render a statement to each employer of benefits paid each individual and charged to such employers' experience-rating record for the twelve-month period ending the previous June 30. Any such benefit charges shall be conclusive and binding upon the employer unless he files an application for review of such charges, setting forth his reasons therefor within 30 days after the mailing of such notice to his last-known address, or in the absence of mailing within 25 days after the delivery of such notice.

* * * * *

4434.8. Unemployment compensation fund.—(a) Establishment and Control. There is hereby established as a special fund, separate and apart from all public moneys or funds of this state, an unemployment compensation fund, which shall be administered by the administrator exclusively for the purpose of this act. This fund shall consist of (1) all contributions collected pursuant to this act, together with any interest thereon collected pursuant to section 13 [§ 4434.13] of this act; (2) all fines and penalties collected pursuant to the provisions of this act; (3) interest earned upon any moneys in the fund; (4) any property or securities acquired through the use of moneys belonging to the fund; (5) all earnings of such property or securities; and (6) all other moneys received for the fund from any other source. All moneys in the fund shall be mingled and undivided.

(b) Accounts and Deposits. The administrator shall maintain within the fund three separate accounts: (1) a clearing

account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the administrator, shall be immediately deposited in the clearing account. All moneys in the clearing account, after clearance thereof, shall, except as herein otherwise provided, be deposited immediately with the secretary of the treasury of the United States of America to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to section 904 [9A, F. C. A., tit. 42, § 904] of the Social Security Act, as amended, any provisions of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. Refunds payable pursuant to section 13 [§ 4434.13] and 18 (g) (6) (E) [§ 4434.18] of this act may be paid from the clearing account or the benefit account. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund in the United States treasury. Except as herein otherwise provided, moneys in the clearing and benefit accounts may be deposited in any depository bank in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. Moneys in the clearing and benefit accounts shall not be commingled with other state funds, but shall be maintained in separate accounts on the books of the depository bank. Such money shall be secured by the depository bank to the same extent and in the same manner as required

by the general depository law of this state; and collateral pledged for this purpose shall be kept separate and distinct from any collateral pledged to secure other funds of the state. The administrator shall give a bond conditioned upon the faithful performance of his duties with respect to the fund in an amount not to exceed $25,000. The bond shall be approved as to legality and form by the attorney-general of this state. All sums recovered for losses sustained by the fund shall be deposited therein.

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4434.13. Collection of contributions.—

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(f) Refunds and Adjustments.

(1) If not later than three years after the date of payment of any amount as contributions, interest, or penalties, an employing unit which made such payment shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment can not be made, and the administrator shall determine that such contributions or interest or penalties or any portion thereof were erroneously collected, the administrator shall allow such employing unit to make an adjustment thereof, without paying interest upon the same, in connection with subsequent contribution payments by it, or if such adjustment cannot be made the administrator shall refund said amount, without interest upon same from the unemployment compensation fund. For like cause and within the same period, adjustment or refund may be so made on the administrator's own initiative.

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4434.18 Definitions.—* * *

(o) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year.

(p) "Benefit year" with respect to any individual means the one-year period beginning with the first day of the first week with respect to which the individual first files a claim for benefits in accordance with section 3 (a) [§ 4434.3] of this act, and thereafter the one-year period beginning with the first day of the first week with respect to which the individual next files a claim for benefits after the termination of his last preceding benefit year; provided, that at the time of filing such a claim the individual has been paid the wages for insured work required under section 3 (c) [§ 4434.3] of this Act.

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